

**DEPARTMENT OF STATE REVENUE**  
**LETTER OF FINDINGS: 09-0691**  
**Sales Tax**  
**For the Years 2007 and 2008**

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's official position concerning a specific issue.

**ISSUES**

**I. Sales Tax – Imposition.**

**Authority:** IC § 6-8.1-5-1; IC § 6-2.5-2-1; IC § 6-2.5-5-34; *Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer protests the imposition of sales tax that resulted from the Department's determination in the audit that Taxpayer had over reported exempt lottery sales thus incorrectly reducing its taxable sales.

**II. Tax Administration – Negligence Penalty.**

**Authority:** IC § 6-8.1-10-2.1; 45 IAC 15-11-2.

Taxpayer protests the imposition of the negligence penalty.

**STATEMENT OF FACTS**

Taxpayer is a food mart with a single Indiana location. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not remitted the proper amount of sales and use tax. Therefore, the Department issued proposed assessments for sales and use tax, negligence penalties, and interest for the tax years 2007 and 2008. Taxpayer protested a portion of the assessments and penalties. An administrative hearing was held and this Letter of Findings ensues. Additional facts will be provided as necessary.

**I. Sales Tax – Imposition.**

**DISCUSSION**

Taxpayer protests the imposition of sales tax that resulted from the Department's

determination in the audit that Taxpayer had over-reported exempt lottery sales thus incorrectly reducing its taxable sales.

In accordance with IC § 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on Indiana retail transactions unless a valid exemption is applicable. Lottery sales are exempt pursuant to IC § 6-2.5-5-34.

Taxpayer reported its monthly sales and use tax based on the totals it derived on monthly reports that broke down sales by various categories: taxable, nontaxable, fuel, and lottery. The Department's auditor compared the numbers on the reports to two months of daily cash register tapes which show the total daily sales for each category and found that the category totals on the monthly reports – based upon which Taxpayer filed its monthly returns - did not match the totals from the cash register tapes for the two sample months. Also, in reviewing the daily cash register tapes, the Department's auditor noted a further discrepancy in the lottery sales category. In many instances the Lotto-Online sales totaled an uneven amount in spite of the fact that on-line lottery tickets are only sold in increments of even dollar amounts. The auditor then compared lottery sales on the daily cash register tapes with Hoosier Lottery daily sales reports to confirm that lottery sales generally were overstated. By overstating lottery sales, which are exempt from sales tax, Taxpayer was consequently under reporting taxable sales. By comparing the lottery sales reported by Taxpayer on its return and the sales taken from the Hoosier Lottery sales reports and instant lottery sales for the sample months in question, the Department's auditor calculated an average percentage by which Taxpayer was underreporting taxable sales and projected that percentage for the periods of the audit.

During the hearing it became evident that Taxpayer was not initially clear on the source of the assessment of additional sales tax. After review of the audit report at hearing, the Taxpayer understood that the majority of the assessment was the result of the lottery sales discrepancy described above. The hearing was held open for several weeks to allow Taxpayer additional time to review its records and provide additional documentation to support its protest. Taxpayer did not provide additional documentation.

The Department notes that all tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(b), (c); *Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Based on the above, Taxpayer has not met its burden to show why the Department's proposed assessment of additional sales tax is incorrect.

### **FINDING**

Taxpayer's protest is respectfully denied.

**II. Tax Administration – Negligence Penalty.**

**DISCUSSION**

The Taxpayer also protested the imposition of the ten percent negligence penalty pursuant to IC § 6-8.1-10-2.1 which states in relevant part:

If a person:

...

(3) incurs, upon examination by the department, a deficiency that is due to negligence;

...

the person is subject to penalty.

Indiana Regulation 45 IAC 15-11-2(b) clarifies the standard for the imposition of the negligence penalty as follows:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The standard for waiving the negligence penalty is given at 45 IAC 15-11-2(c) as follows:

The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc;

(5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Taxpayer has not affirmatively established, as required by 45 IAC 15-11-2(c), that its underreporting of taxable sales was due to reasonable cause and not due to negligence.

**FINDING**

Taxpayer's protest is respectfully denied.

**CONCLUSION**

Taxpayer's protests of the assessment of sales tax and negligence penalty are denied.